

FEDERAL COURT OF AUSTRALIA

Tang v Minister for Immigration and Border Protection [2018] FCA 1274

Appeal from: Application for an Extension of Time and Leave to Appeal:
Tang v Minister for Immigration & Anor [2017] FCCA 2885

File number: VID 1231 of 2017

Judge: **KENNY J**

Date of judgment: 23 August 2018

Legislation: *Federal Court of Australia Act 1976* (Cth)
Migration Act 1958 (Cth)
Federal Circuit Court Rules 2001 (Cth)
Federal Court Rules 2011
Migration Regulations 1994 (Cth)

Cases cited: *BAO15 v Minister for Immigration and Border Protection* [2016] FCA 214
House v The King (1936) 55 CLR 499
MZZTC v Minister for Immigration and Border Protection [2015] FCA 1209

Date of hearing: 23 August 2018

Registry: Victoria

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: No Catchwords

Number of paragraphs: 49

The Applicant did not appear

Counsel for the First Respondent: Mr L Leerdam

Solicitor for the First Respondent: DLA Piper Australia

Counsel for the Second Respondent: The Second Respondent submitted to any order, save as to costs

ORDERS

VID 1231 of 2017

BETWEEN: **NGOC NGA TANG**
 Applicant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **KENNY J**

DATE OF ORDER: **23 AUGUST 2018**

THE COURT ORDERS THAT:

1. 1. The applicant's application for an adjournment be refused.
2. 2. The application for an extension of time and leave to appeal be dismissed under r 35.33(1)(i) of the Federal Court Rules 2011 (Cth).
3. 3. The applicant pay the first respondent's costs of the application, fixed in the sum of \$1756.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KENNY J:

1 This is an application for an extension of time within which to seek leave to appeal and, if an extension is granted, for leave to appeal from an interlocutory judgment of the Federal Circuit Court. The primary judge dismissed the applicant's judicial review application on the basis that the applicant failed to appear at a hearing on 30 October 2017: see *Tang v Minister for Immigration & Anor* [2017] FCCA 2885.

BACKGROUND

2 The background to this application is as follows.

3 The applicant is a citizen of Vietnam. She applied for a Partner (Residence) (Class BS) visa (**Visa**) on 20 April 2011 on the basis of her relationship with her sponsor, an Australian citizen.

4 A delegate of the first respondent (**delegate**) refused the Visa on 25 February 2014, on the basis that the applicant did not satisfy cl 801.221 of Schedule 2 to the *Migration Regulations 1994* (Cth) (**Regulations**). This was because the delegate was not satisfied that there was sufficient evidence to demonstrate that the applicant and the sponsor were in a genuine spousal relationship. Shortly after the delegate's decision, the applicant applied to the Administrative Appeals Tribunal (**Tribunal**) for review of that decision. The Tribunal affirmed the delegate's decision on 26 February 2015, and the applicant sought judicial review in the Federal Circuit Court. On 16 September 2015, that Court set aside the Tribunal's decision and remitted the matter to the Tribunal for a fresh decision.

5 The applicant attended three hearings before the Tribunal, differently constituted, which made the decision the subject of the most recent judicial review application in the Federal Circuit Court. The sponsor did not attend any of these hearings. At the first hearing, on 21 January 2016, the Tribunal's reasons record that the applicant advised the Tribunal that her sponsor had gone missing as his business had failed. The Tribunal adjourned the hearing, in order to afford the sponsor an opportunity to attend a hearing on another occasion. At the second hearing, on 16 March 2016, the Tribunal recorded that "[t]he sponsor did not attend on this occasion either, even though it appeared he had returned". According to the Tribunal, the applicant claimed that she was not able to get the sponsor to attend because, when he was

affected by drugs, he would not listen to her. Nonetheless, the applicant claimed to still be in a genuine and continuing spousal relationship with the sponsor. At this hearing the Tribunal expressed its concern about the lack of current evidence demonstrating that the relationship was ongoing and genuine at the time of decision. At a third hearing, on 4 April 2016, the applicant attended the Tribunal with her sister in law, who also gave evidence. The applicant sought more time to support her husband, and the Tribunal noted that the provision of assistance to the sponsor did not prevent her from providing the additional information that was required to demonstrate that she and the sponsor were still in a genuine and continuing relationship at the time of the decision. The Tribunal advised the applicant that she had until the Tribunal handed down its decision to provide any additional material in support of claims regarding her spousal relationship with the sponsor. No further material was forthcoming.

6 6 The Tribunal affirmed the delegate's decision refusing her application for the Visa. The Tribunal accepted that the applicant and the sponsor had been married for over five years at the time of the Tribunal's decision, but was not satisfied on the evidence before it that "the parties have a mutual commitment to a shared life to the exclusion of all others". It was not satisfied that the material presented by the applicant after early 2015 indicated any continuity in the relationship. The following is a non-exhaustive summary of the Tribunal's detailed reasons.

7 7 The Tribunal accepted that the sponsor might be struggling with addiction, but found that "at the time of writing [there was] no persuasive medical evidence regarding the sponsor's condition ... to demonstrate that the applicant is taking part in assisting the sponsor as a spouse to recover from addiction". The Tribunal added:

Whilst by no means determinative of the review, the limited evidence submitted regarding the sponsor's condition does leave questions in the mind of the Tribunal as to whether the sponsor is still in a genuine and continuing spousal relationship with the applicant, regardless of his difficulties and that his non-appearance could be seen as reflective of a lack of commitment on his part to the visa applicant.

8 8 The Tribunal also considered financial aspects of the relationship and referred to financial details about the sponsor's business. It placed "some weight" on the fact that the applicant and the sponsor had "declared each other their respective spouses in tax return for the financial years ending June 2013 and June 2014". The Tribunal acknowledged that "the sponsor's business has wound up and it appears that he is not working while the applicant stated at the hearing that she continues to work at a bakery". It concluded, however, on financial aspects:

In the circumstances, the Tribunal makes allowances for the limited income that would be coming into the household and does not have [an] expectation that they would have purchased any major assets together. Even so, the Tribunal is troubled by the limited evidence submitted after late 2014 that would indicate that the parties continue to share a joint account or that the visa applicant is providing financial support to the sponsor during his time of crisis.

While the evidence would point to the parties having initially, at least, started to join their finances, the evidence peters away, leaving the Tribunal to have concerns about whether at the time of decision, the parties pool their limited resources and the extent to which they share household expenses.

9 9 As to the nature of the household, the Tribunal took account of the applicant's statement that "she could not provide evidence of her current living arrangements with the sponsor because she and he were living with her parents-in-law so utility accounts were in their names". The Tribunal referred to the parties' statutory declarations made in March 2013, to the effect that they shared everything and took care of the sponsor's mother and father. It also referred to various documents that were jointly addressed to the parties and other material before concluding on this aspect that:

Over a five year period, it would be expected that a couple would be able to accumulate a wealth of documentary evidence of every day purchases that point to mutual expenses in relation to health, combined rental payments, and of support to their respective parents as claimed.

The Tribunal takes into account that the applicant claims that now that the business has failed, she and the sponsor are unable to provide evidence of a shared household because they share expenses with her parents-in-law, and all the bills are in their names. Even if this is the case, the Tribunal would have expected that since 2014 when the documentary trail evaporates, the parties would have had expenses specific to their relationship and their combined household ...

In addition, as highlighted at hearing with the applicant, there appears to be an absence of evidence for the majority of 2015 and now 2016 ...

As the narrative of the relationship almost ceases in early 2015, the Tribunal is not satisfied that at the time of decision the parties are living together in a genuine and continuing spousal relationship. This is particularly so as the parties have submitted little authoritative evidence of where they are currently living and if they are living together rather than separately and apart on a permanent basis.

10 10 The Tribunal also considered the social aspects of the relationship, as evidenced in photographic material, letters and statutory declarations from other people on which the applicant relied, finding that this material failed to show a spousal relationship at the time of the decision. The Tribunal continued:

As for the other indicia of Regulation 1.15A, the evidence appears to fall silent after early 2015 even though the Tribunal emphasised with the applicant that this was problematic as it raised doubts about whether the relationship was still in existence after that time.

...

Overall, the Tribunal, in the absence of more recent corroborative evidence that would demonstrate that the parties continue to be in a genuine and continuing spousal relationship, the Tribunal is not persuaded that the parties continue to present to the community and society at large as being in a genuine and continuing spousal relationship.

11 11 Given its findings, the Tribunal was not satisfied that at the time of its decision the parties were in a spousal relationship. It was not satisfied that the applicant met cl 801.221(2) (c) of Schedule 2 to the Regulations and satisfied the criteria for the Visa. It also held that there was no evidence that the applicant met the alternative criteria.

FEDERAL CIRCUIT COURT PROCEEDINGS

12 12 The applicant applied again for judicial review by the Federal Circuit Court. Her application set out one particularised ground. This was:

The decision of the Administrative Appeals Tribunal (Migration Division) is affected by jurisdictional error.

Particulars

- (a) the Tribunal has asked the wrong question, taken into account irrelevant factors and not taken relevant factors into account when considering the question of the definition of the term Spouse and the nature and all the circumstances of the relationship.
- (b) the Tribunal given the unique circumstances of the case, where the sponsor is addicted to ice, should have given notice to the applicant or her advisor that updated statutory declarations would need to be provided by the sponsor's parents specifically addressing the current medical condition of the sponsor.
- (c) The witness Ms Tham T Dao who was the applicant's sister in law gave evidence, however, the tribunal chose not to ask her any questions as to the medical condition of the sponsor and about his addiction to ice. This would have been a very relevant factor in the tribunal gauging the circumstances of the relationship between the parties and coming to its decision.

13 13 On 19 October 2016, the applicant filed "Applicant's Contentions of Fact and Law", addressing this ground.

14 14 A hearing was fixed for 12 October 2017, but the applicant did not appear. On 11 October 2017, the applicant contacted the Court to advise that she was unable to attend the hearing "due to my sickness and medical certificate is attached for your attention". She provided a medical certificate from Northland Medical and Dental Centre, covering the period of 11-12 October 2017, which said that she was "receiving medical treatment" and that over those dates that she "will be unfit to continue her usual occupation". The certificate was

completed by Dr Thusitha Welendawe. The certificate did not specify the applicant's medical condition. It did not otherwise indicate why she was unable to attend court.

15 15 The primary judge noted that the matter remained listed but despite the Court's attempts to contact the applicant by mobile phone on the number she had given, the Court was unable to contact her, the phone number being apparently disconnected. There was no appearance for the applicant when the matter was called on for hearing on 12 October. On that day, despite the respondent Minister's opposition, the primary judge adjourned the proceeding to 30 October 2017 and ordered that the respondent Minister's costs be "fixed in the sum of \$300 and reserved".

16 16 The Court received a further adjournment request from the applicant on 30 October 2017, again on the basis that she was unable to attend the hearing due to "sickness". A medical certificate also accompanied this request. This medical certificate was from Richmond General Medical Centre and was completed by Dr Cuc Nguyen, general practitioner. It stated that he had examined the applicant on 27 October 2017 and that:

In my opinion she is/was suffering from a medical condition. She will be/was unfit for work/school from Friday, 27 October 2017 and up to and including Tuesday, 31 October 2017.

17 17 The applicant did not appear at the hearing on 30 October 2017. She did not seek to appear by telephone.

18 18 The primary judge held that each of the medical certificates were "entirely unsatisfactory" because they did not assist the Court in determining whether the applicant was unable to attend court. Her Honour explained this by saying:

Neither of the certificates describe the medical condition from which the Applicant is said to be suffering and why it was that such condition would have the effect of precluding the Applicant from an ability to attend Court. The medical certificates, on their face, do not persuade the Court that the Applicant is, in fact, unable to attend Court on the hearing of this matter.

The Court notes that two doctors have provided certificates from two different medical centres for the Applicant in respect of the Applicant's alleged inability to attend her respective Court hearing dates.

I refer to the decision of Pagone J in *MZZTC v Minister for Immigration and Border Protection* [2015] FCA 1209 in which His Honour gave consideration to a similar medical certificate. His Honour referred to the decision of Lindgren J in *NAKX v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1559 and said:

The case indicated that what needs to be provided, for a certificate to be meaningful, is material that establishes why it is, or how it is, that an appellant suffering from a medical condition would be unfit for participation at a hearing in court. A description such as “unable to attend court”, as his Honour considered in that case was unsatisfactory. The more generalised description of Dr Qazi in this case of the appellant having “lower back pain” is even less satisfactory. It does not assist the court to evaluate why it is or how it is that his condition would prevent the appellant to attend court, and it does not help the patient, the appellant, in making the case that he needs to make. Doctors providing certificates of this kind assist nobody, although, of course, there is no reason to assume that what is needed has been brought to their attention.

On the last occasion the matter was before the Court, the Court gave the Applicant the benefit of the doubt and adjourned the proceedings to this date. The Applicant had participated in the proceedings to the extent of filing written submissions and had not previously sought an adjournment of the proceedings. The medical certificate was equally deficient, but the Court determined to adjourn the matter out of an abundance of caution.

In these circumstances, the Court rejects the application for an adjournment and shall deal with the matter on the basis upon which the First Respondent has urged the Court to do, which is to dismiss the application pursuant to r 13.03C(1)(c) of the *Federal Circuit Court Rules 2001* (Cth).

APPLICATION IN THIS COURT

19 19 Since the dismissal of an application under r 13.03C(1)(c) of the *Federal Circuit Court Rules 2001* (Cth) (**FCC Rules**) is an interlocutory judgment, the applicant requires leave to appeal from it: s 24(1A) of the *Federal Court of Australia Act 1976* (Cth). Pursuant to r 35.13(a) of the *Federal Court Rules 2011* (Cth), the applicant was required to file any application for leave to appeal within 14 days after the date on which the judgment appealed from was pronounced or the order was made.

20 20 The primary judge delivered judgment on 30 October 2017 and, in consequence, the last day for filing a notice of appeal was 13 November 2017: see r 1.61 and 35.13(a) of the *Federal Court Rules 2011* (Cth). The applicant filed her application for an extension of time on 14 November 2017, one day after the expiry of the period of 14 days for filing an application for leave to appeal. The extension of time application was supported by an affidavit sworn by the applicant on 14 November 2017. There was also a draft notice of appeal, which stated the following ground of appeal: “[t]he decision of the Federal Circuit Court is affected by a denial of procedural fairness and natural justice”. The applicant provided the following particulars of this ground:

In that a medical certificate had been provided stating that the applicant was unfit to attend between 27 October 2017 and 31 October 2017. That whilst it is conceded this was the second such application for an adjournment, the medical condition as

referred to by the treating doctor was chicken pox. The onus should have been on the court to contact the applicant and request that the doctor state what exactly the medical condition was, so that the court would be in a better position to make its finding about the validity of the application for an adjournment and acted in accordance with Rule 13.03C(b).

- 21 The written submissions filed by the applicant did not, however, address this ground. Instead, they challenged the Tribunal's decision, claiming in effect that it involved jurisdictional error. The applicant contended in writing that:

the Tribunal "has erred in that the Tribunal has asked the wrong question, taken into account irrelevant factors and not taken relevant factors into account when considering the question of the definition of the term Spouse and the nature and all the circumstances of the relationship between the applicant and her husband";

the Tribunal "given the unique circumstances of the case, where the sponsor is addicted to ice, should have given notice to the applicant or her advisor that updated statutory declarations would need to be provided by the sponsor's parents specifically addressing the current medical condition of the sponsor"; and

"The witness Ms. Tham T Dao who was the applicant's sister in law gave evidence, however, the tribunal chose not to ask her any questions as to the medical condition of the sponsor and about his addiction to ice. This would have been a very relevant factor in the tribunal gauging the circumstances of the relationship between the parties and coming to its decision".

- 21 22 The first respondent filed written submissions dated 16 August 2018.

ADJOURNMENT APPLICATION

- 22 23 The hearing of the applicant's application was fixed for this afternoon, 23 August 2018. The first respondent appeared at the hearing, represented by counsel. The applicant did not appear.

- 23 24 At 8:18 pm in the evening of 22 August 2018, the applicant sent an email to the email address of my executive assistant, which stated:

I regret to inform you that I am sick and unable to attend the hearing on 23 August 2018 at 2:15 pm

I attach my Medical Certificate for your attention and request you to postpone my hearing to another date.

- 24 25 The attached medical certificate was from Richmond Family Medical Clinic and certified that the applicant:

has a medical condition and will be unfit for work or study from Thursday, 23 August 2018 to Thursday, 23 August 2018 inclusive.

The certificate was completed by Dr Huy Tan Nguyen.

25 26 My associate replied to the applicant as follows (omitting formal parts):

I acknowledge receipt of your email.

You are required to attend Court to make an application for an adjournment. The Court hearing will take place at 2:15 pm when you may make your adjournment application. You may attend Court in person or by telephone.

Please let me know now whether you would like to appear by telephone and I will make the appropriate arrangements.

The first respondent's solicitors were also copied in to this email.

26 27 It will be seen from the foregoing account that this is not the first time that the applicant has sought an adjournment of a hearing fixed for an application that she has made to a court, on the basis of a medical certificate that fails to identify her medical condition or why her condition would preclude her from attending court. The first respondent opposed the applicant's request for an adjournment, as conveyed in her email last night, on the basis that the substance of her extension of time application in this Court relates to the refusal of an adjournment on the basis of a similarly unsatisfactory medical certificate.

27 28 I further observe that the medical certificate that the applicant sent by email last night was not from either of the medical centres responsible for the medical certificates relied on in the Federal Circuit Court, or completed by either of the practitioners who had previously completed those medical certificates.

28 29 The applicant was, moreover, clearly on notice that an adjournment would not necessarily be granted merely because the applicant said she was "sick" and the accompanying medical certificate referred only to an unidentified "medical condition" that was said to make the applicant "unfit for work or study" on the day fixed for the hearing . Further, the applicant failed to appear, whether in person or by telephone (see below), notwithstanding the Court had not granted her an adjournment. Further, as will be seen, the applicant made no attempt to contact the Court after sending her email after close of business on 22 August 2018, to ascertain her position.

29 30 As my associate's email to the applicant indicated, the applicant was invited to attend the hearing today either in person or by telephone. She did not seek to attend by telephone and, as noted already, did not attend in person. Chambers staff not only emailed her as indicated but also telephoned her today, to ensure that she was aware that she could attend by telephone. The Chambers telephone number was left as a message, for her to return the call.

Chamber staff telephoned on some seven occasions, and the Court attendant telephoned from the court today. The applicant did not answer the telephone on any occasion, and nor did she call back.

30 31 There can be no doubt that the applicant has been aware of the hearing date for some time. On 13 April 2018 the Court notified her that the matter would be listed before me, on a date and time to be confirmed. On 9 May 2018 my Chambers staff notified the applicant that the matter was listed for hearing today at 2:15 pm by an email sent to the email address notified by her. That email also attached a copy of the scheduling orders of Registrar McCormick made on 28 November 2017. My Chambers staff sent a further email to the parties on Monday, 20 August 2018 to remind the parties that the matter was listed for hearing today at 2:15 pm. The email reminded the applicant that it was important she attend the hearing and noted that if she did not attend, the Court may proceed in her absence. The email also requested that she confirm she received the email. No response was received to that email. On 20 August 2018 Chambers staff called the mobile telephone number notified by the applicant to the Court. Chambers staff spoke to the applicant, who confirmed that she had received the email confirming the hearing date, time and location.

31 32 In all the circumstances of the case, I am of the opinion that the interests of justice would not be served by granting the applicant the adjournment she sought.

32 33 The first respondent submitted that the Court should dismiss the application under r 35.33 of the *Federal Court Rules 2011* (Cth) on the basis that the applicant was absent when her application was called on for hearing. I acceded to this application, bearing in mind the matters to which I have referred. I am fortified in my view that her application for an adjournment should be refused and her application should be dismissed under r 35.33(1)(i) by the fact that it appears that there is little, if any, merit in the applicant's application.

APPARENT MERITS OF APPLICANT'S APPLICATION

34 As Perry J said in *BAO15 v Minister for Immigration and Border Protection* [2016] FCA 214 at [19]:

The considerations relevant to determining whether to grant an extension of time include the length of the delay, the applicant's explanation for the delay, any prejudice to the respondent and the substantive merits of the proposed appeal: *SZSPR v Minister for Immigration & Border Protection and Another* [2013] FCA 1210; (2013) 139 ALD 109 at 113 [16]; *Hunter Valley Developments Pty Ltd v Cohen*

(1984) 3 FCR 344 at 348-349. Relevant considerations to deciding whether to grant leave to appeal include whether an appeal would have any reasonable prospects of success and whether the applicant would suffer substantial injustice if leave were refused, assuming the decision subject to appeal is wrong: *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399.

35 The first respondent conceded that he will not be prejudiced by the delay, and the length of the delay was not significant.

36 The applicant deposed in an affidavit affirmed by her on 14 November 2017 that:

[T]he Court Registry has contributed to me seeking this extension. The decision was made on the 30th October 2017 and I did not receive a decision, just a copy of the order until 6 November 2017. That as a layperson, I had no idea that I had to make an appeal within 14 days of the date of the decision, as I thought it was 21.

I then tried to seek legal advice and Tuesday, 7 November 2017 was a holiday, so no one was available. However, it was difficult to have a conference at short notice and so I filled out all relevant forms and then lodged this appeal, as soon as possible.

33 37 While this explanation may not be entirely satisfactory, of more significance was the fact that the proposed appeal had no apparent merit or prospect of success. For present purposes, the applicant's written submissions can be put to one side. The issues they raised did not arise for determination on the application before the Court.

34 38 The only issue that arose was whether there was any merit in the applicant's challenge to the dismissal of her application under r 13.03C(1)(c) of the FCC Rules. If there were no such merit, this would be dispositive of her application for the grant of an extension of time and leave to appeal.

35 39 The applicant in this case failed to attend the hearing on 30 October 2017 and, in consequence, the discretionary power to dismiss her application was engaged: see 13.03C(1)(c) of the FCC Rules. The applicant challenged her Honour's exercise of discretion to summarily dismiss her application on the basis she was denied procedural fairness and natural justice.

36 40 A challenge to an exercise of discretion in a matter going to the practice and procedure of the Federal Circuit Court, such as a challenge to an exercise of the discretion conferred by r 13.03C(1)(c) of the FCC Rules, would normally fall within the principles set out in *House v The King* (1936) 55 CLR 499 (*House v The King*) at 504-505. Dixon, Evatt and McTiernan JJ there said:

The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

- 37 41 As we have seen, in this case, in exercising her discretion, the primary judge:
- 0 • took account of the fact that the applicant applied for an adjournment on the basis of an unidentified sickness;
- 1 • took account of the fact that the medical certificate accompanying her application did not identify her medical condition or why it would preclude her from attending court;
- 2 • took account of the fact that the applicant had previously applied for an adjournment on the basis of unidentified medical treatment and did not identify why it would preclude her from attending court;
- 3 • took account of the fact that the certificates had been completed by different medical practitioners at different medical centres; and
- 4 • took account of the fact that the medical certificates were unsatisfactory in that they did not assist her in determining whether or not the applicant was able to attend court.

38 42 The primary judge also took account of the nature of the applicant's participation in the litigation.

39 43 With respect to the grant of the applicant's adjournment request on 12 October 2017, her Honour stated that she had regard to the fact that the applicant had earlier filed written submissions and had not previously sought an adjournment, as well as the Court's inability to contact her on the mobile phone number she had given although the matter remained listed. As her Honour put it, she gave the applicant the "benefit of the doubt".

With regard to the applicant's adjournment request of 30 October 2017, her Honour:

- took account of the matters mentioned in the previous paragraph;
- took account of the fact that this was the second occasion on which the applicant made an adjournment request without adequate explanation;
- took account of the fact that the Court had not received the adjournment request until the very day of the hearing; and
- took account of the fact that, without having been granted an adjournment, the applicant failed to appear at the hearing or seek to appear by telephone.

In proceeding in this way, there is no evident error of principle of the kind contemplated in *House v The King*.

There is also no merit in the applicant's complaint that she was denied procedural fairness and natural justice because the "onus should have been on the court to contact the applicant and request that the doctor state what exactly the medical condition was, so that the court would be in a better position to make its finding about the validity of the application for an adjournment". It is for the applicant for an adjournment to make a case for an adjournment. Where sickness is said to be the impediment, it is for the applicant to ensure that the Court is appropriately informed about the nature of the medical condition and how, or why, it prevents the applicant from attending court: see, for example, *MZZTC v Minister for Immigration and Border Protection* [2015] FCA 1209 at [2]-[4].

The applicant's proposed appeal was therefore lacking such merit or prospects of success as would justify the extension of time and leave to appeal that the applicant sought.

DISPOSITION

For the reasons stated, the application to adjourn made by email this morning is refused and the application for an extension of time and leave to appeal is dismissed with costs.

If the applicant wishes to continue to challenge the Tribunal's decision, presumably on the bases indicated in her written submissions, she might apply to the Federal Circuit Court to set aside the primary judge's orders under r 16.05(2)(a) or (c) of the FCC Rules, by way of an application in the same proceeding in which the primary judge's orders were made.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated: 23 August 2018